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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1980

No. 80-5920

VICTOR E. GOODE,

APPELLANT

-vs-

STATE OF OHIO,

APPELLEE

AN APPEAL FROM THE SUPREME COURT OF OHIO

MOTION IN THE ALTERNATIVE TO DISMISS OR AFFIRM

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IN THE SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1980

No. 80-5920

VICTOR E. GOODE,

APPELLANT

-vs-

STATE OF OHIO,

APPELLEE

MOTION IN THE ALTERNATIVE TO DISMISS OR AFFIRM

May it please the Court:

Appellee moves that the appeal herein taken be dismissed on the ground that said appeal does not present a substantial federal question.

BRIEF IN SUPPORT OF MOTION IN THE ALTERNATIVE TO DISMISS OR AFFIRM

OPINION BELOW

This is an appeal from a decision of the Supreme Court of Ohio, which dismissed an appeal by the Appellant, thereby leaving the Second District Court of Appeals decision intact. The final Court of Appeals decision, rendered on April 15, 1980, was the second decision by that Court. It followed a limited reversal and remand to the trial court for the purpose of an in camera hearing to determine whether the Appellant's constitutional rights had been violated due to the inaccessibility to the Appellant of prior testimony taken in a juvenile case.

The second appeal to the Second District Appellate Court resulted in an affirmation of the Greene County Common Pleas Court's decision, upholding Appellant's conviction. Thereafter, the Ohio Supreme Court ruled that the appeal raised no substantial constitutional questions and sua sponte dismissed the appeal in an unreported decision. All relevant decisions of the state courts were filed by Appellant in his Appendix to his Jurisdictional Statement.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Appellant's jurisdictional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent Constitutional and Statutory provisions are set forth in the Appellant's jurisdictional statement.

STATEMENT OF THE CASE

Appellee does not take issue with the statement of the case as set forth in the Appellant's jurisdictional statement except in one aspect.

In Appellee's Memorandum Contra to a Motion for Reconsideration filed on July 17, 1979, which concerned the question of whether discrepancies existed between the testimony of the prosecutrix at trial and a prior juvenile trial, the prosecution did not admit "that there was at least one discrepancy." [Appellant's Jurisdictional Statement, at 10]. The statement which was made by the State was: "The State of Ohio conceded that the fourth alleged discrepancy may be viewed as a minor inconsistency, but certainly not of the magnitude to constitute prejudicial error." [Appendix, Memorandum Contra to a Motion for Reconsideration, at 3]. Although Appellant has consistently stated that the Appellee agrees that there are inconsistencies, the State of Ohio has stated that there are none, and that if, arguendo, they were found to exist, they are minor.

ARGUMENT

The basis of Appellant's two-pronged claim is that he was denied his constitutional rights to confront and cross-examine witnesses. Appellee readily acknowledges that those Sixth Amendment

rights apply to the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400 (1964).

First, the Appellant asserts that he was denied his Sixth Amendment rights when he was not given a transcript of the juvenile proceeding of a co-defendant. The Appellee contends that, due to the limited reversal and subsequent in camera inspection of the juvenile trial, the Appellant's constitutional rights have been addressed. There is, therefore, no further remedy necessary.

Initially, the trial court determined that Ohio's Juvenile Rule 37(B) would bar the Appellant from obtaining a copy of the testimony of two of the State's witnesses in a prior juvenile proceeding. Pursuant to State v. Cox, 42 Ohio St.2d 200 (1975), and State v. White, 15 Ohio St.2d 146 (1968), the Second District Court of Appeals held that the trial court had erred in not granting an in camera inspection of the juvenile record to determine whether inconsistencies existed. It reversed and remanded to the trial court, with instructions to order a new trial if the trial court found that there were inconsistencies, and that those discrepancies prevented the defendant from receiving a fair trial. State v. Goode, slip opinion, Case No. CA 1025, Greene County Ct. App. (April 24, 1979).

The law in Ohio is therefore consistent with the guidelines set forth in Davis v. Alaska, 415 U.S. 308 (1974). Constitutional rights of the criminal defendant cannot be submerged because of a juvenile shield statute. State v. Cox, 42 Ohio St.2d 200 (1975).

In this case, Appellant is not claiming, however, that the juvenile rule itself denied him the right of confrontation. Rather, he is insisting that his remedy was unacceptable. Pointing at a discovery rule, Ohio Criminal Rule of Procedure 16(B)(1)(g), Appellant claims that he was entitled to the transcript if any inconsistencies existed, regardless of whether they were minor.

Appellee submits that the Appellant's right to the use of a prior juvenile trial transcript is not absolute. Procedurally, Appellant is entitled to an in camera inspection and a hearing on the evidence and alleged discrepancies. Such a procedure is mandated by State v. White, supra, and is not significantly altered by the criminal rules. Here, the trial court specifically found that the testimony in both transcripts was identical as to the elements of the crime and factual description of the evening. Prior to the triggering of Criminal Rule 16(B)(1)(g), the Court must determine that inconsistencies do exist.

Appellant's argument that the remedy granted by the appellate court was ineffective is unconvincing. There were no inconsistencies in the testimony. Most of the alleged discrepancies were the result of out-of-context phrases lifted by the Defendant. Assuming, arguendo, that there were any actual discrepancies, they were so minor that the use of them could not possibly affect the credibility of the prosecuting witness.

The situation in this case is not the one addressed in Davis v. Alaska, supra, where the juvenile record itself would reveal bias. Davis did not encounter a request for a juvenile transcript. Here, the appellate court determined that Appellant's Sixth Amendment rights would be adequately protected by the remand, and Appellee submits that they were. Had discrepancies been found, Appellant would have been given a new trial. It is apparent from the appellate decision that, if such a situation were to arise in the future, the trial judge must permit an in camera examination of the juvenile transcript upon request of the defendant, and furnish the defendant with the inconsistent testimony if any should exist. Thus, the standard is set for the future, and it has not been demonstrated that the Appellant has suffered any harm by the remedial measure used.

Appellant's reference to Britt v. North Carolina, 404 U.S. 226 (1971), is inappropriate in this case. Britt involved the right of a criminal defendant to obtain a copy of his earlier trial in order to prepare for a later one. While the Appellee will agree with that right, it does not follow that a criminal defendant automatically "needs" or is entitled to a transcript of a juvenile co-defendant's trial. Davis v. Alaska, supra, suggests a balancing test, and recognizes therein that a state does have a legitimate interest in protecting the anonymity of juvenile records. The constitutional rights of the defendant and the state's interests can both be adequately protected by the procedures established by State v. White, supra, and by the appellate court in this case.

Finally, the Appellee submits that the Ohio Supreme Court, which established the Criminal Rules of Procedure, did not subscribe to the Appellant's contention that Criminal Rule 16(B)(1)(g) expanded the decision in State v. White, supra. Because there is no attack on the constitutionality of Juvenile Rule 37, or Criminal Rule of Procedure 16(B)(1)(g), and the Appellant's constitutional rights were addressed in this case, there is no federal question involved in this prong of the appeal.

Turning, then, to Appellant's second argument, Appellee will further demonstrate that there is no reason for this Court to accept jurisdiction over this case. Ohio's rape shield statute, Ohio Revised Code, Section 2907.02(D), has been attacked by Appellant as unconstitutional. Appellant attempted to introduce evidence that the victim of the rape had been living with a man, that she had intercourse with him five or six times a week, and that she had previously had an abortion. The trial court would not permit such evidence, relying upon the rape shield statute to exclude it.

Ohio's rape shield statute, as drawn and construed, requires a balancing test to determine admissibility of sexual evidence,

i.e., probative value versus prejudicial effect. O.R.C. §2907.02(D); State v. Gardner, 59 Ohio St.2d 14 (1979). It is, in essence, an evidentiary tool, and is similar to many state statutes and Federal Rule of Evidence 412. See Tanford and Bocchino, Rape Victim Shield Laws and The Sixth Amendment, 128 U. Pa. L. Rev. 544, 591-602 (1980). Such rules and statutes were enacted to protect the victim from being senselessly subjected to examination concerning irrelevant sexual history, and to aid the states and federal government in prosecuting what has traditionally been the most underreported crime---that of rape. State v. Gardner, supra. See also, Note, Rape Reform Legislation: Is It the Solution?, 24 Cleve. St. L. Rev. 463 (1975).

Obviously, there are times when the defendant's constitutional rights will outweigh the inflammatory or prejudicial effect of testimony. However, the Ohio statute is not inflexible: it allows for a hearing on the proposed evidence.

It is not, and never has been, the right of any participant in a trial to introduce irrelevant and highly emotional evidence. People v. McKenna, 585 P.2d 275 (Col. 1978). The Sixth Amendment right to confrontation does not encompass a right to introduce irrelevant material. State v. Blue, 225 Kan. 576, 592 P.2d 897 (1979). As to the issue of consent, evidence of a victim's prior unchastity is generally not probative, absent circumstances which enhance its probative value. United States v. Kasto, 584 F.2d 268 (8th Cir. 1978), cert. denied, 440 U.S. 930 (1979). In this case, the jury was made aware of the fact that the victim had been fighting with her boyfriend, and that she was very distraught. There was evidence that she was upset and that she wanted to get back to him badly enough that she was willing to hitchhike from Columbus to Oxford. Therefore, the jury knew what her mental state was on the night of the rapes. Contrary to what the Appellant has claimed,

evidence that the victim Sherlock had lived with her boyfriend, that she had had intercourse with him with frequency, and that she had had an abortion was irrelevant as to any of the issues in this case, and would have been introduced only to inflame the jury against the rape victim.

Under the facts of this case, the Appellant's constitutional right to confrontation was not infringed upon by the application of the statute in question. "The defendant's right to confront witnesses against him is not absolute, but must bow to 'other legitimate interests in the criminal trial process. Chambers v. Mississippi, 410 U.S. [284 at 295].'" State v. Mastropetre, 400 A.2d 276, 281 (Conn. 1978). Accord, People v. Thompson, 76 Mich. App. 705, 257 N.W.2d 268 (Ct. App. 1977); United States v. Kasto, supra. See also Rozell v. Estelle, 554 F.2d 229 (5th Cir. 1977), cert. denied, 434 U.S. 942 (1977). Where, as here, other means are available to impeach the witness, and are in fact used, exclusion of the inflammatory evidence is not an infringement of the rights of the defendant. It is no more relevant to inquire as to prior sexual history of the rape victim in most cases than it is to inquire about a robbery victim's prior donations to a family member or friend.

As has been amply shown by this brief supporting a Motion in the Alternative to Dismiss or Affirm, there is no reason for this Honorable Court to proceed further with this case. The Supreme Court of the State of Ohio did not err in dismissing the appeal, because neither issue herein addressed by the Appellant raises a substantial federal question. Clearly, no constitutional violation has occurred, and the rape shield statute, Ohio Revised Code, Section 2907.02(D), is not unconstitutional on its face or as applied. Therefore, Appellee's motion to dismiss should be sustained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion in the Alternative to Dismiss or Affirm has been forwarded, by regular U.S. mail, to Steven D. Rowe, Counsel for Appellant, at Kemp, Schaeffer & Rowe Co., LPA, 45 North Wilson Road, Columbus, Ohio 43204, on this ____ day of January, 1981.

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	Case No. 77 CR 186
-vs-	:	
VICTOR E. GOODE	:	MEMORANDUM CONTRA TO A MOTION FOR RECONSIDERATION
Defendant	:	

* *

This case comes before this Court on remand by the Court of Appeals, Second Appellate District for review of the transcript of testimony of Karen Sherlock, the primary prosecution witness for the State of Ohio in the case of State v. Goode, 77 CR 186 and State v. Mayes, 10109, Juvenile Division of the Common Pleas Court. The purpose of this review is to determine whether or not certain inconsistencies exist in the testimony of Karen Sherlock that resulted in actual prejudice to the Defendant-Appellant denying him a fair trial and due process of law.

The State of Ohio will demonstrate that each and every alleged "discrepency" or "inconsistency" in the testimony of Karen Sherlock was taken out of context from the record as a whole. In order of the Defendant's allegations, the first alleged inconsistency is that Karen Sherlock testified ~~that~~ the trial of Victor Goode, that Victor Goode and Richard Mayes did not say whether they would take her all the way to Oxford, Ohio. Defendant contends that on page 5 of the transcript of the juvenile hearing of Richard Mayes, Ms. Sherlock testified that they would take her all the way to Oxford. On page 392-393 of the transcript of the proceedings of Victor Goode, the following testimony was recorded:

BY MR. DEWINE:

Q. What conversation, if any, did you initally have with them when you got into the car?

A. I told them I was going to Oxford and asked them if they could take me part or all of the way.

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Q. Did they respond in any way?

A. They said they would.

Comparing the above testimony with that on page 5 of the transcript of the juvenile hearing, it is clear that no discrepency exists. At the trial of Victor Goode, Ms. Sherlock merely recanted that Victor Goode and Richard Mayes agreed to give her a ride. Karen Sherlock's testimony at the trial of Victor Goode was, at best, a mere general affirmation and lacked the specificity that exists on page 5 of the juvenile hearing transcript, but it certainly cannot be viewed as an inconsistency.

The second alleged inconsistency pertains to Ms. Sherlock's knowledge of the co-defendant's name. On page 6 of the juvenile court transcript, Karen Sherlock testified that she learned the names while they were at Richard Mayes' house in Columbus.

BY MR. HALLER:

Q. Did you know his name at this time?

A. Well, when he had gone into the house, the other man in the car introduced himself and then Richard Mayes. He introduced both of them. That was when I first learned their names.

At page 405 of the transcript of the trial of Victor Goo Karen Sherlock testified consistently with the statements made i juvenile court hearing; that is that Victor Goode introduced the selves at the home of Richard Mayes in Columbus. Karen did tes at Goode's trial that she learned their first names, but at May hearing she did not state whether the Defendant gave both their first and last names. This, again, cannot be viewed as an inconsistency because of the lack of preciseness in the juvenile hearing

The third discrepency the Defendant cites concerns the nature of the conversations that took place on the way toward Xenia On page 8 of the juvenile court transcript, and page 399 of the trial court proceeding, Karen specifically stated the same pieces

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of information concerning Xenia. In both transcripts it is evident that the parties talked about the tornado and Karen's past connection with the City of Xenia. No discrepency can be said to exist pertaining to the nature of that conversation.

The State of Ohio concedes that the fourth alleged discrepency may be viewed as a minor inconsistency, but certainly not of the magnitude to constitute prejudicial error. Defendant states on page 5 of his Memorandum in Support of Reconsideration that Karen Sherlock testified at the juvenile hearing that she had been sitting on the passenger side of the vehicle until they reached McDonalds in Xen.. However, Karen testified at the trial of Mr. Goode that she sat between the co-defendants earlier that morning when they stopped to purchase beverages. A careful review of page 9 of the juvenile court transcript in conjunction with page 395 of the trial testimony will reveal no substantial difference to constitute prejudicial error. The State of Ohio contends such a discrepency is harmless error. Criminal Rule 52(A). In determining whether it was harmless error, a reviewing court must read the entire record, disregarding the objectional material. If the error alleged is constitutional in nature and if the Court finds that there is overwhelming evidence of the Defendant-Appellant guilty, aside from the disputed material, then it must hold that the error is not prejudicial but harmess beyond a reasonable doubt and affirm the judgment of the trial court. Harrington v. Californi 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967). In the case of non-constitutional error, the reviewing court must read the record, disregarding the objectional material and then determine whether or not this was "substantial" evidence of the Appellant's guilt before it affirms or reverses the judgment of the trial Court. State v. Davis, 44 Ohio App. 2d 335, 338 N.E. 2d 793 (1975). In the case before this Court the Defendant claims a constitutional error,

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however, this one minor inconsistency does not withstand a test for reversal or a new trial when examined against the multitude of much more significant statements. The Defendant-Appellant incurred no prejudice from this one minor instance.

The fifth alleged discrepency concerns a statement by Victor Goode. On page 13 of the juvenile court transcript the following colloquy took place:

BY MR. HALLER:

Q. So what happened then?

A. So, he continued on in this way, "Isn't there something you could do? Just turn one of us on and we will go on our way."

Q. Who was saying this?

A. Victor Goode said that. He said, "Just turn Rich on."

Q. Indicating who?

A. Richard Mayes. . .

When comparing the above testimony with page 406 of the trial court transcript it is clear that Karen Sherlock accurately and consistently repeated the statements made by Victor Goode. As a result no discrepency can be discerned from the testimony.

The sixth discrepency cited by the Defendant-Appellant, concerning the motive of dressing in the rear of the vehicle, presents a mystery to the prosecution. The State fails to understand what the alleged conflicts said to exist between page 14 of the juvenile court trial transcript and the adult trial, specifically, pages 408-410. Examination of these pages reveals the identical revelation of events at both hearings.

The seventh alleged discrepency in the testimony of Karen Sherlock, concerning Mr. Goode's request that Karen assist him in obtaining an erection, is insignificant at best. See pages 410 through 415 of State v. Goode, and page 15 of State v. Mayes.

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Regardless of when the request for assistance came, whether it be the first or second time Victor Goode was in the back seat with Karen, it cannot be said to be of any great significance. The fact of the matter is that Karen accurately revealed the events as they took place. The shock and humiliation of being raped by the two men is more than sufficient basis for allowing Karen to testify as to what happened to the best of her recollection. The law is not so rigid as to require Karen to pinpoint the exact time this statement was made.

Finally, on page 29 of the juvenile court transcript, Defendant contends that Karen's testimony that Victor Goode made no specific threats of force against Karen negates that element of the crime charged. Karen Sherlock testified that she could not specifically remember the threats of Victor Goode, however, the purposeful compelling of Karen Sherlock to submit to sexual intercourse with two men was the result of the fear of physical harm. The record reveals on pages 13-17, and 33 of the juvenile court transcript and pages 408-412 of the adult trial the fear of physical harm that Karen experienced. For example, Richard Mayes said he would hurt her, kill her even, and force her to make a decision by the time he finished his cigarette. Victor Goode tugged on Karen's injured ankle in his attempts to get her in the back seat. Both men instructed her to keep quiet and called her "a bitch" while raping her. All of these instances viewed as a whole indicate the fear that Karen experienced. She pleaded with them to leave her alone but chose to submit in an effort to save her life.

As a result, viewing the record as a whole, both transcripts it is clear that the alleged inconsistencies are non-existent. The Supreme Court found in State v. White, 27 Ohio St. 2d 73, (1971) the record does not reveal that the inconsistencies or variations

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between the statements and evidence denied the Appellant a fair trial. Applied to the case at bar, the record in this case does not reveal that any inconsistency between the testimony of Karen Sherlock at Victor Goode's trial and at Richard Mayes' hearing constituted any prejudicial error. What may be viewed as an inconsistent statement is nothing more than harmless error. No substantial rights of the Defendant were affected, nor was there prejudice demonstrated.

For the above reasons the State of Ohio respectfully requests this Court to affirm the conviction and deny the Defendant's request for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded to Mr. Steven Rowe, Attorney for Defendant, 45 North Wilson Road, Columbus, Ohio 43204 this 11th day of July, 1979 by regular U.S. Mail.

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